STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
HOEKSTRA, P.J., AND WHITBECK AND METER, JJ

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

Supreme Court No. 120489

v

Court of Appeals No. 225887

MELISSA ANN NUTT,
Defendant/Appellant /

Oakland County Circuit Court No.
99-167397-FH

DEFENDANT/APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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I. DOES THE INSTANT PROSECUTION VIOLATE MS. NUTT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE MICHIGAN AND UNITED STATES CONSTITUTIONS, AND DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL JUDGE'S FINDING TO THAT END?

The trial Court answered "yes."

The Court of Appeals answered "no."

Defendant-Appellant respectfully asserts the answer is "yes."

A. DOES THE TEST SET FORTH BY THE MICHIGAN SUPREME COURT IN PEOPLE V WHITE SET FORTH THE PROPER TEST FOR ANALYSIS OF DOUBLE JEOPARDY QUESTIONS?

Neither the trial Court nor the Court of Appeals answered this question.

Defendant-Appellant respectfully asserts the answer is "yes."

B. DOES THE MICHIGAN CONSTITUION PROVIDE GREATER PROTECTION ON DOUBLE JEOPARDY ISSUES THAN THE UNITED STATES CONSTITUTION?

Neither the trial Court nor the Court of Appeals answered this question.

Defendant-Appellant respectfully asserts the answer is "yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant/Appellant herein, **MELISSA ANN NUTT**, was charged in the Oakland County Circuit Court with one count of Receiving and Concealing a Stolen Firearm, alleged to be contrary to MCL 750.535(b). Specifically, the information in this matter alleges she, on or about December 14, 1998, "did conceal a firearm, knowing the firearm was stolen."

Prior to the above charge having been lodged against her, Ms. Nutt had been charged in Lapeer County in a multiple-count information alleging various episodes of Home Invasion/Breaking and Entering, and Larceny. (Lapeer County Circuit Court No. 99-006598-FH(H)) Pursuant to a plea agreement, she tendered a plea of guilty to one count of Home Invasion, involving the dwelling where the subject firearms were stolen, on or about February 22, 1999, and was sentenced to a probationary term by the Honorable Nick O. Holowka on or about April 19, 1999. The remaining counts in the Lapeer County matter were dismissed as part of the agreement.

Subsequent to the tendering of the guilty plea, but approximately one (1) week prior to the Lapeer County sentencing, Ms. Nutt was made aware a warrant for the above-cited Oakland County charges had been authorized and issued. Ms. Nutt surrendered herself shortly after sentencing, and the matter proceeded to Preliminary Examination.[1]

Upon the matter being bound over to Circuit Court and subsequent to Ms. Nutt's arraignment there, a Motion to Dismiss was filed, briefed and argued before the Oakland County Circuit Court. The Motion raised both Double Jeopardy and Due Process concerns. On March 1, 2000, the Circuit Court Judge granted the Motion and the matter

was dismissed. In granting Ms. Nutt's Motion, the Circuit Court limited its ruling to the Double Jeopardy issue.

On or about March 13, 2000, the People, through the offices of the Oakland County Prosecuting Attorney, caused a Claim of Appeal to be filed with the Michigan Court of Appeals. On November 9, 2001, the Michigan Court of Appeals issued its decision, which, in three separate opinions (one lead opinion, one concurrence, and one dissent) reversed the decision of the Oakland County Circuit Court and remanded the matter for further proceedings.

From that decision, Defendant applied for Leave to Appeal. On or about November 20, 2002, the Michigan Supreme Court granted her Application, limiting review to whether the filing of Oakland County charges violated her protection from Double Jeopardy, further directing the parties to brief "whether **People** v **White**, 390 Mich 245 (1973) sets forth the proper test to determine when a prosecution for the 'same offense' is barred on Double Jeopardy grounds under Mich Const 1963, Art I, Sec. 15, and whether our constitution provides greater protection than does US Const Amend V."

This Brief is in support of Ms. Nutt's position her right to be free from Double Jeopardy was, and is, violated by the Oakland County proceeding.

ARGUMENT

I. THE INSTANT PROSECUTION VIOLATES MS. NUTT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE MICHIGAN AND UNITED STATES CONSTITUTIONS, AND THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL JUDGE'S FINDING TO THAT END

[1] For purposes of this Appeal only, Defendant/Appellant does not address the merit or lack of merit to the District Court binding the matter over to Circuit Court, though the Double Jeopardy issue was raised, and preserved, therein.

A. STANDARD OF REVIEW

The Standard of Review to be applied to the trial Court's decision on a Motion to Dismiss is generally a determination as to whether or not the trial Court abused its discretion. **People** v **Stephan Adams**, 232 Mich App 128; 591 NW2d 44 (1998). (See also, Dissenting Opinion, page 2, footnoting the same case in footnote 7.) However, as pointed out in the dissenting opinion, the applicability of case law is reviewed ***de novo***. (Dissent, page 2, footnoting **People** v **Lugo**, 214 Mich App 699; 542 NW2d 921 (1995)).

B. THE TEST SET FORTH BY THIS COURT IN *PEOPLE v WHITE* DOES, IN FACT, SET FORTH THE PROPER TEST FOR ANALYSIS OF DOUBLE JEOPARDY QUESTIONS

As noted above, the Order Granting Ms. Nutt's Application directed the parties to address whether **White** sets forth the proper test for applicability of Double Jeopardy provisions.

1. Background of *People v White*

In **White**, this Court was presented with the following: Defendant therein was charged in two separate charging instruments with different offenses (Kidnapping in one, Criminal Sexual Conduct ["rape"] and Felonious Assault in another) arising out an episode in which the victim was kidnapped in one city then driven to another, where forced intercourse was undertaken. Convicted by two separate juries, Defendant appealed the second conviction (Rape and Felonious Assault), and succeeded in obtaining reversal of that conviction on Double Jeopardy grounds. A Prosecutorial Appeal of that ruling was taken, and subsequently affirmed.

2. The *White* Decision/Adoption of the "Same Transaction" Test

In **White**, this Court adopted the "same transaction" test for application by Michigan Courts in determining whether criminal prosecution for the same offense was barred pursuant to Michigan Constitutional prohibitions against Double Jeopardy. That test was set forth in a concurring opinion in **Ashe** v **Swenson,** 397 US 436; 90 SCt 1189, 25 LEd2d 469 (1970).[2] In doing so, this Court reviewed and cited Mr. Justice Brennan's historical review of Double Jeopardy at some length, noting the prior adoption, and shortcomings, of the "same evidence" test, and his rationale for urging adoption of the "same transaction" test. **White**, at 253-254 (citing **Ashe**, 397 US 436, 450-454). Additionally, this Court reviewed significant out-of-state case law and treatise authority in arriving at the adoption of the test. **White**, at 255-257 (numerous citations omitted).[3]

The "same transaction" test set forth in **White** has been followed in subsequent holdings by this and other Michigan Courts. See, e.g., **Crampton** v **54-A District Judge**, 397 Mich 489; 245 NW2d 28 (1976). In **People v McMiller**, 202 Mich App 82 (1993), the holding of the Court of Appeals required the Prosecution to join at one trial all charges arising from a continuous time sequence which demonstrate a single intent and goal. See also, **People** v **Gonzales**, 197 Mich App 385; 496 NW2d 312 (1992).

3. Sufficiency of the *People v White* test.

In addressing the first issue directed for briefing by this Court, one need look no further than the **White** decision itself--its analysis of Justice Brennan's concurrence in the **Ashe** decision, and one of the footnotes to this Court's opinion in **White**.

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[2] As noted by this Court in **White**, the **Ashe** Court did not actually reach the issue of whether or not the same transaction test was constitutionally necessary, as the Opinion of the Court reversed the conviction on narrower grounds. **White, supra,** at 255.

[3] The second section of this Court's opinion in **White** discussed jurisdictional issues surrounding the adoption of the "same transaction" test. It will not be analyzed in this Brief.

First, in reviewing the "same evidence" test, Justice Brennan demonstrated the perilous history of that test, citing examples of successive prosecutions when multiple victims are involved, and division of a single transaction consisting of "chronologically discrete crimes" into multiple prosecutions.[4] See **White** at 254-55, quoting **Ashe** at 450-454. He further, in the same passage, quite accurately noted the highly limited review of prosecutorial discretion (and abuses thereof) allows nearly unlimited potential for abuse.

Second, as noted in Footnote Nine (9),[5] the Prosecutor in **White**, admitted the second prosecution was the result of dissatisfaction with the sentence on the first. While the candor was admirable, it is not guaranteed in every prosecution, every time. Abandoning the "same transaction" test allows Prosecutors what could be, in effect, the ability to act in an extrajudicial capacity—second-guessing sentencing judges, testing different strategies until one works, or just flat-out harassment of an accused, who is, until and unless properly convicted, protected by numerous Michigan and Federal Constitutional safeguards. Further, inasmuch as the "same evidence" test has been demonstrated to be less than effective, this Briefwriter is reluctant to suggest alternatives.

In summary, the "same transaction" test is the only one which gives ***either*** Michigan or Federal Constitutional protections against Double Jeopardy any meaning. It should stand.

C. THE MICHIGAN CONSTITUTION DOES (AND PROPERLY SO) PROVIDE GREATER PROTECTION ON DOUBLE JEOPARDY ISSUES THAN THE UNITED STATES CONSTITUTION

[4] One example cited by Justice Brennan, and included by this Court in its opinion was a Kentucky case which apparently involved illegal gambling. There, ***seventy-five*** hands of poker were either prosecuted, or sought to be prosecuted, as 75 "separate offenses."

[5] 390 Mich at 259--260

The right of an accused to be free from Double Jeopardy has its roots in both the United States, **US Const, AmV**, and Michigan Constitutions, **Const 1963, art 1, Sec.15**.

1. Current Federal Law

The United States Supreme Court case of **United States** v **Dixon**, 509 US 688; 113 SCt 2849, 125 L Ed 2d 556, 568 (1993) sets forth the current test utilized by federal courts for determining whether or not there are multiple prosecutions in violation of the Double Jeopardy protections—the "same elements" test. There, the inquiry is directed to whether each offense contains an element not contained in the other. If not, the subsequent prosecution is barred. The **Dixon** Court referred to the test as the "Blockburger test," previously set forth by the United States Supreme Court in **Blockburger** v **United States**, 284 US 299; 52 SCt 180; 76 L Ed 306 (1932).

In 1990, the United States Supreme Court expanded the **Blockburger** test in the case of **Grady** v **Corbin**, 495 US 508; 110 SCt 2084; 109 L Ed 2d 548 (1990). Beside the **Blockburger** inquiry, federal courts must ***also*** inquire as to whether the elements of the subsequent prosecution require proof the ***conduct*** constituting the "first" offense and conviction occurred (in the second.)

2. Current Michigan Law

Decisions of the Michigan Supreme Court, both recent and less recent, and decisions of the Michigan Court of Appeals explicitly state the Michigan Constitutional protections against Double Jeopardy are greater than the Federal ones.

The most recent Michigan authority on this point is this Court's opinion in the case of **People** v **Bullock**, 440 Mich 15 (1992). There, just over a decade ago, while deciding other questions, this Court explicitly noted it can, and has afforded greater

protections in several areas, ***including the Double Jeopardy protections.*** **Bullock,supra,** at 28, fn 9 (citing **People** v **White**, and comparing it with **Grady** v **Corbin**.)

In reviewing the Michigan Courts' evaluation of Double Jeopardy, this Court, prior to **Bullock**, explicitly stated in the text of its opinion the Michigan protections were broader than the Federal counterparts, adding a "failed" challenge under the Federal test does not preclude consideration under the Michigan test, set forth in **People** v **White**. **People** v **Carter**, 415 Mich 558 (1982). The **Carter** opinion also indicated the Michigan analysis emphasized ***proven*** conduct as opposed to the theoretical crimes involved, as well as an "expansive" definition of necessarily included offenses. See also, **People** v **Ora Jones**, 395 Mich 379; 236 NW2d 461 (1975.)

The above case law has been cited as precedent in a number of Michigan Court of Appeals cases, many of which are cited in the Court of Appeals' opinion in this case, as well as in other locations in this Brief, follow the **White/Carter/Bullock** line of cases. See **People v Squires**, 240 Mich App 454 (2000), **People v Hunt** 214 Mich App 313 (1995), **People v McMiller**, **supra, People** v **Gonzales**, **supra, People v Flowers** 186 Mich App 652 (1990).

D. UNDER EITHER ANALYSIS, THE SUBSEQUENT PROSECUTION OF MS. NUTT IS BARRED BY HER PROTECTIONS AGAINST DOUBLE JEOPARDY, AND THE TRIAL COURT PROPERLY GRANTER HER MOTION TO DISMISS THE SECOND CHARGE

1. Analysis under the Federal standard

A review of the controlling Federal authority, set forth in **Grady** v **Corbin**, mandates reversal of the Court of Appeals' decision. Ms. Nutt, in the Lapeer County proceeding, was convicted of Home Invasion, Second Degree, Contrary to MCL 750.110a(3). The charging instrument alleged (and she admitted guilt to) she "did break

and enter a dwelling located at [location omitted] with the intent to commit a larceny therein....."[6] The items stolen were, in fact, the guns she was accused of receiving and concealing in the matter before this Court. Testimony at Preliminary Examination in this case included the victim of the very charge she pled guilty to in Lapeer County, as well as one of the Lapeer County Sheriff's Department's Detectives.

When the respective records are reviewed in these matters, it is beyond serious contention the conduct sought to be proven, and to some extent, ***proven in both matters,*** complained of in the first prosecution occurred in the second. Under Federal analysis, the second prosecution must be denied, and the trial Court's dismissal reinstated.

2. Analysis under Michigan Law

Whatever the applicability of subsequent authority, the test set forth in **People** v **White** still controls, and dismissal of Ms. Nutt's charge in this prosecution should be upheld.

a. The offense for which Ms. Nutt stands convicted in Lapeer County and the present offense arise from a continuous time sequence.

The concurring and dissenting opinions from the Court of Appeals decision are in agreement on this point. The offense to which Ms. Nutt tendered her plea in Lapeer County involved the home invasion of the residence where the weapons were located, and from which they were stolen. All elements necessary to complete the offense of Receiving and Concealing the stolen firearms were completed before Ms. Nutt reached the county line, but, as the dissent notes, the concealment did not occur, but ***successfully continued*** for some time later, in another venue. (Dissent, page 3-4)

[6] This was Count I of a six (6) count warrant. Count II alleged Larceny in a building, contrary to MCL 750.360, by stealing guns and other property from the same address. Counts III and IV, then Counts V and VI followed the same pattern with respect to other locations and other property.

In the lead opinion, the charges against Ms. Nutt are found not to be part of the same criminal episode. Continuity is either non-existent or irrelevant. The question left unanswered by the lead opinion is: when did the first crime cease? If the logic of the lead opinion were followed to its end, Ms. Nutt, or someone similarly situated, could be charged with the instant offense in any ***and every*** County where they were merely present with the stolen property. For example, a theft occurring at a home invasion in Bay County, where the offender returned immediately to a home or base of operations in Ann Arbor, ***could*** result in Receiving and Concealing charges being brought in Bay (along with the original theft) Saginaw, Genesee, Oakland, Wayne, ***and*** Washtenaw Counties if the offender followed the I-75/I-94 Freeways to get from site of theft to final stop. Worse yet, she could be charged with additional counts for every "time unit" (i.e., days, hours, minutes, seconds, or worse) the prosecution, in its discretion, decided appropriate, that she was in possession of the ill-gotten property . It is a stretch, to say the least, this was ever the intended, or desired outcome.

b. The lead opinion and concurrence err in holding the offense for which Ms. Nutt was convicted, to-wit: Home Invasion, Second Degree, and the instant charge do not share a single intent and goal.

The specific count Ms. Nutt tendered her plea of guilty to in Lapeer County involved, as stated above, the residence where the firearms were located, and from which they were stolen.

Further, as the dissent persuasively notes, the two statutes before the Court for analysis do have common purposes, and case law mandates a broad interpretation of those purposes, particularly inasmuch as this is a multiple prosecution issue. (Dissent, page 4, n 22, citing **People v Sturgis**, 427 Mich 392(1986))

The weight given **People v Squires**, 240 Mich App 454 (2000) by the concurrence is, respectfully, misplaced. As noted by that Court, the Defendant there was convicted by pleas of guilty to both charges, later seeking to challenge the multiple convictions, a challenge waived by the very pleas of guilty.

Finally, the controversy the opinions attempt to address regarding the application of **People v Flowers** 186 Mich App 652 (1990) as opposed to **People v Hunt** 214 Mich App 313 (1995) is not, or should not, be an issue. The dissent notes, quite forcefully, the facts set forth in **Hunt** are nearly identical to those before the Court here. It is **Hunt** which quite clearly answers the questions before us today, and which should be applied.

SUMMARY AND CONCLUSION

First, the case law set forth in this State make it clear **People** v **White** does, in fact, set forth the appropriate test for evaluations of Double Jeopardy issues, particularly when one considers the underlying United States Supreme Court authority set forth therein. The second issue is straightforward—the Michigan Constitution can, and does, provide greater protection against Double Jeopardy than the Federal Constitution.

Finally, whichever test is applied, the trial Court acted appropriately in dismissing the second prosecution against Ms. Nutt. Analysis of the matter under **Grady v Corbin** clearly demonstrate necessary conduct from the first offense/conviction was present in the second. Under State law analysis, it is clear the two prosecutions were part of the same criminal episode and the laws involved were intended to prevent the same ***or similar*** harm or evil.

RELIEF SOUGHT

WHEREFORE, Defendant-Appellant respectfully prays this Honorable Court

A. Enter an Order Reversing the Decision of the Court of Appeals in this matter, reinstating the dismissal.

Dated: January 27, 2003

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